Supreme Court, U.S.
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No. 01-920

In The

Supreme Court of the United States

JAMES A. LAW, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF JANICE C. LAW AND JAMES A. LAW,

Petitioner,

v.

WALTER CAMP, M.D., BRUCE L. WARWICK, FRANK A. CORVINO, MITCHELL KLINE, WEI-NCHIH LEE, GREENWICH HOSPITAL, FRANCIS X. WALSH, M.D., ARTHUR ROSENBERG, M.D., JAMES BRUNETTI AND DICKERMAN HOLLISTER, JR., M.D.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION OF RESPONDENTS WALTER A. CAMP, M.D., FRANCIS X. WALSH, M.D., ARTHUR ROSENBERG, M.D. AND DICKERMAN HOLLISTER, JR., M.D.

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QUESTIONS PRESENTED FOR REVIEW

1. The Second Circuit Court of Appeals affirmed the District Court's granting of summary judgment in favor of Respondents in this medical malpractice action, because Petitioner did not timely produce the expert testimony required by Connecticut law on the applicable standard of medical care, breach of that standard, and causation of damages. Should the Supreme Court review the application of well-settled state law to Petitioner's medical malpractice action?

2. The Second Circuit Court of Appeals affirmed the District Court's denial of Petitioner's Motion for Partial Summary Judgment – premised on the theory that Connecticut General Statutes Section 19a-571 established a legislative standard of care, such that a failure to follow the statute amounted to *negligence per se* – because Petitioner presented no legislative history and no case law to support this theory. Moreover, Petitioner could not show by expert testimony that violation of the statute proximately caused the damages he claimed. Should the Supreme Court review this interpretation of well-settled state law, even where overturning such an interpretation would not change the outcome of the case because Petitioner cannot prove causation?

3. Petitioner did not raise a constitutional challenge to Connecticut General Statutes Section 19a-571 in the lower Courts, and neither of the lower Courts premised their decisions on the statute. Should the Supreme Court undertake a constitutional review of the statute for the first time in this case, even where a decision that the statute is unconstitutional would not change the outcome because the lower Court's decisions turned on Petitioner's failure to timely disclose expert witnesses to support his malpractice claims?

PARTIES TO THE PROCEEDING

This Brief in Opposition to Petitioner James Law's Petition for a Writ of Certiorari is submitted by Respondents Dickerman Hollister, Jr., M.D., Francis X. Walsh, M.D., Walter Camp, M.D., and Arthur Rosenberg, M.D. Several of the remaining parties to the proceeding have also submitted a separate brief, but will, along with Drs. Hollister, Walsh, Camp and Rosenberg, be referred to collectively herein as "Respondents."

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STATEMENT OF THE CASE

Petitioner filed these consolidated medical malpractice actions against nine doctors, a hospital, and the hospital's Chairman of the Board and its President, claiming that Respondents were negligent in the care and treatment of his mother. Petitioner also alleged that various Respondents falsely informed him during a lengthy family meeting that his mother was "brain-dead," thereby fraudulently inducing his consent to removal of life-sustaining measures. Respondents denied the allegations, several of them invoking a special defense under Connecticut General Statutes Section 19a-571, a statute granting immunity to physicians who follow its terms in these situations.

Under well-settled Connecticut law, Petitioner was required to prove each element of his claims through expert testimony. Despite the passage of years and numerous discovery deadlines, Petitioner failed to disclose even one expert that would testify that Respondents had breached the applicable standard of care or that any treatment given by Respondents caused his alleged damages.[1] As a result, Respondents filed Motions for Summary Judgment, on the grounds that Petitioner could not prove any of the elements of his case with the requisite expert testimony, which the District Court granted. *See Law v. Camp*, 116 F. Supp. 2d 295 (D. Conn. 2000). The District Court also denied Petitioner's Partial Motion for Summary Judgment, in which he made the novel claim

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[1] Petitioner's discovery foibles are well detailed in the District Court's opinion. *Law v. Camp*, 116 F. Supp. 2d 295, 299 (D. Conn. 2000).

that Respondents were *negligent per se* because they failed to follow the terms of Connecticut General Statutes Sections 19a-504 and Connecticut General Statutes Section 19a-571.[2]

The District Court rejected that claim, and further found that Petitioner's failure to produce expert testimony as to causation would render his argument ineffectual even if it were correct. *Id.* at 304 & n.4. Importantly, the District Court never reached the issue of whether Respondents were immune from suit under Section 19a-571.

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[2] Only Connecticut General Statutes Section 19a-571 is at issue here. The statute provides, in relevant part,

> [A]ny physician . . . who . . . withholds, removes or causes the removal of a life support system of an incapacitated patient *shall not be liable for damages in any civil action*, provided (1) the decision to withhold or remove such life support system is based on the best medical judgment of the attending physician in accordance with usual and customary standards of medical practice; (2) the attending physician deems the patient to be in a terminal condition or, in consultation with a physician qualified to make a neurological diagnosis who has examined the patient, deems the patient to be permanently unconscious; and (3) the attending physician has considered the patient's wishes concerning the withholding or withdrawal of life support systems. If the wishes of the patient have not been expressed in a living will the attending physician shall determine the wishes of the patient by consulting any statement made by the patient directly to . . . the patient's next of kin . . . (Emphasis added).

In a Summary Order, the Second Circuit affirmed the District Court's decision in its entirety based on the Petitioner's failure to timely produce expert testimony in support of his malpractice claim. *See Law v. Camp*, 15 Fed. Appx. 24 (2nd Cir. 2001). In doing so, the Court further rejected Petitioner's argument, *raised for the first time on appeal*, that the Fourteenth Amendment prohibited the removal of life support systems, because Petitioner failed entirely to present any evidence of the requisite state action. *Id.* at 26. Additionally, after the submission by Respondents of the voluminous legislative history of Connecticut General Statutes Section 19a-571 – *which demonstrated beyond peradventure that the legislature intended to create a safe harbor for physicians participating in removal of life-sustaining treatment, not a private right of action or a legislative standard of care* – the Second Circuit adopted the reasoning of the District Court on Petitioner's *negligence per se* claim. *Id.* at 27.

REASONS FOR DENYING THE PETITION

This is a case about Petitioner's failure to present the expert testimony necessary to prove a medical malpractice case. There is no dispute that Petitioner failed to timely produce expert testimony to support his claims of malpractice. In an attempt to circumvent this basic requirement of Connecticut law, Petitioner tried to transform Connecticut General Statutes Section 19a-571, by its clear terms an immunity statute, into a legislative standard of care governing cessation of life sustaining measures. Petitioner claimed unsuccessfully at the District Court that a failure to follow the statute's terms was

negligence per se, obviously in the hope that he would avoid the need for an expert as to the applicable standard of care and breach thereof. Petitioner's appeal to the Second Circuit also turned on that specious argument.[3]

The Second Circuit upheld the District Court by applying bedrock state law principles, nothing more. Under Supreme Court Rule 10, review of these decisions, absent some other basis, is simply not warranted. *See Virginia v. American Booksellers Assn., Inc.*, 484 U.S. 383, 395 (1988) (The Supreme Court rarely reviews a construction of state law agreed upon by the two lower federal courts).

Moreover, as the District Court correctly noted, because Petitioner failed to present expert testimony on causation, he could not prevail even if his distorted interpretation of Section 19a-571 were correct. *See Law*, 116 F. Supp. 2d at 306. The question presented in the Petition is therefore entirely abstract, because it would not change the outcome of the case. Even if Connecticut General Statutes Section 19a-571 were held to set a legislative standard of care, a breach of which amounted to *negligence per se*, Petitioner presented no expert to testify that such a breach proximately caused his mother's death.[4] Accordingly, the issue is hypothetical and not a proper basis for certiorari.

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[3] Petitioner also appealed several of the District Court's discovery rulings, which are not a part of this Petition.

[4] Petitioner seizes on a phrase used in one of Respondents' briefs – that removal of life support systems "only hastened a result that was, by anyone's measure, inevitable" – as an admission of causation. Argument of counsel is, of course, not evidence, and cannot make up for what Petitioner lacked in

The remainder of Petitioner's arguments are a similarly futile attempt to create a federal issue out of the interpretation and application of state law. For example, Petitioner now appears to claim for the first time in this case and without meaningful analysis that Connecticut General Statutes Section 19a-571 is unconstitutional. Petitioner misses the mark because neither the Second Circuit nor the District Court relied upon the statute as a basis for granting summary judgment, making the constitutionality of the statute irrelevant. Moreover, Petitioner misinterprets this Court's decisions in *Vacco v. Quill*, 521 U.S. 793 (1997) and *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990) when he claims that the Second Circuit's decision conflicts with them. Those decisions are

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evidence and legal precedent; but taken in its fuller context, the phrase has a different and more nuanced meaning than Petitioner ascribes:

> "The conclusion is inescapable: Mrs. Law had been rendered in a terminal condition by hypoxic encephelopathy suffered as a result of a cardiorespiratory arrest. She would have died from the condition. The removal of life support here only hastened a result that was, by anyone's measure, inevitable. The removal of life support, as in [*State v. Guess*, 44 Conn. App. 790, 800, 692 A.2d 849 (1997), *aff'd*, 244 Conn. 761, 715 A.2d 643 (1998)] and [*McConnell v. Beverly Enterprises-Connecticut, Inc.*, 209 Conn. 692, 710, 553 A.2d 596 (1989)] was not the proximate cause of Mrs. Law's demise. Brief of Appellee, Dickerman Hollister, M.D., at 16.

Respondent's position – that Connecticut courts had long held that removal of life support systems could not be considered the proximate cause of death in a patient rendered in a terminal condition by some pre-existing medical condition or pathology – is not an admission of causation or of any willful act.

entirely consistent with, although irrelevant to, the outcome here.

Petitioner's claim that the Second Circuit's decision "sets a national rule that eliminates the need for physicians and hospitals to abide by the statutory requisites of removal of life support statutes," Petition, at p. 6, also lacks merit. The issue upon which summary judgment was granted was Petitioner's failure to present adequate expert witnesses. The District Court's application of state law regarding disclosure of experts and a Second Circuit decision affirming it scarcely set a "national rule," particularly where a Summary Order is not to be formally cited as authority. *See* Rule 0.23, Local Rules of the Second Circuit.

Further, the facts in this case reflect a terminal patient whose life support was removed with the consent of the family. The decision allowed the patient's condition to proceed to its foregone conclusion rather than to hold that conclusion in abeyance.[5] It has no application whatsoever to "euthanasia or physician-committed homicide." It also has nothing to do with acting without consent. In fact, the Petition is glaringly devoid of any connection between the constitutional rights claimed therein and the decisions of the District Court and the Second Circuit. This is because the issue was not raised below. Neither court dealt with the Petitioner's decedent's right to live

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[5] In fact, life support systems were not "removed" in this case. More accurately, the decedent was placed on "patient-assisted ventilation," which was designed to allow the patient to breathe if she exhibited any brain function at all. *See Law,* 116 F. Supp. 2d at 301.

or die or even the right to remove life support. Both courts dealt with the necessary proof in a malpractice case and its absence. The distinction is of great importance: there is no federal or constitutional issue in this case to be decided by the Supreme Court.

For the reasons set forth herein, Respondents respectfully assert that there are no compelling issues that require review by this Honorable Court, and respectfully urge the Court to deny the Petition for Writ of Certiorari.

ARGUMENT

I. Even If It Were Timely Raised, The Fourteenth Amendment Is Inapplicable To This Case.

The Second Circuit correctly concluded that the Fourteenth Amendment had no application to this case, because Petitioner offered no evidence that Respondents were anything but private actors, to which the Fourteenth Amendment does not apply. *Law*, 15 Fed. Appx. at 26. Given the lack of state action, further review is unnecessary.[6]

[6] Petitioner failed to raise this argument at the District Court, thereby waiving his right to make it for the first time on appeal. The Second Circuit, however, addressed the issue on its merits, ostensibly because it was easily decided given the complete lack of state action. *Law*, 15 Fed. Appx. at 26.

II. The Constitutionality of Connecticut General Statutes Section 19a-571 Was Not Raised Below And Is Irrelevant To The Outcome Here.

As a general matter, an argument not advanced below, and not forming the basis upon which a decision is rendered, is not appropriate for consideration by the Supreme Court. *See Holly Farms v. NLRB*, 517 U.S. 392, 400 n.7 (1997). Petitioner never raised the claim that Connecticut General Statutes Section 19a-571 was unconstitutional at any level of the proceedings below. (And for good reason, since such an argument was incongruous with Petitioner's invoking of the statute as a basis for a *negligence per se* theory.) More importantly, Respondents prevailed not because of the protection afforded by the statute but because of Petitioner's lack of expert testimony. Therefore, even if his argument here is adequately raised – which it is not – the constitutionality of the statute is entirely irrelevant, as it was not the basis upon which the lower Courts' decisions rested and would not change the outcome of this case.

III. The Second Circuit's Decision Does Not Conflict With Prior Decisions Of This Court.

Petitioner's claim that the Second Circuit's decision conflicts with this Court's decisions in *Vacco v. Quill*, 521 U.S. 793 (1997) and *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990) is not justified because this case simply does not have constitutional import. In *Cruzan*, the Court dealt with an attempt by health surrogates to *compel a state hospital* to cease life-sustaining measures given to an incompetent. *Cruzan*, 497 U.S. at 265. The case

had nothing to do with a medical malpractice claim that life-support had been negligently terminated by private actors (especially where there was no expert testimony to support such a claim).

The health surrogates in *Cruzan* challenged the State of Missouri's attempt to impose a "clear and convincing" evidentiary standard when considering the wishes of an incompetent whose surrogate seeks a cessation of life-sustaining treatment. *See Cruzan*, 497 U.S. at 278-81. The Court decided that the Fourteenth Amendment did not prevent the State from imposing such a standard. The Court did not decide that the Constitution *requires* a state to impose a clear and convincing evidentiary standard, or any other standard, to a statutory process authorizing removal of life-support systems. Even if it had, there is no evidence in this case that there is a single process, statutory or otherwise, that governs removal of life-sustaining measures by private actors in Connecticut.

The Court's decision in *Vacco* is also irrelevant to this case. It does not address the need for experts in a state-law based medical malpractice action. It does not enumerate any rule of law applicable to the removal of life sustaining-measures that took place in this case, nor could it, since the actors were private. Rather, in *Vacco*, the Court held that the State of New York could outlaw a process known as "assisted suicide" without impinging on fundamental constitutional rights or unfairly singling out a suspect class of persons. *See Vacco*, 521 U.S. at 799-800. Nothing in the *Vacco* decision has specific application to the situation or to the private actors here.

To the extent that the Court's decisions in *Cruzan* and *Vacco* have some reach beyond the specific facts of each case, there is nothing in those opinions that conflicts with the results reached here. Both recognize the right of a patient, competent or not, to refuse life-sustaining treatment, whether personally or through a health care surrogate or next-of-kin. *See, e.g., Cruzan*, 497 U.S. at 278-285. The Court in *Cruzan* acknowledged that many states had established "substituted judgment procedures" which utilize varying standards for determination of the patient's wishes. *Id.* at 284-85. And in *Vacco*, the Court recognized that there was a fundamental and widely recognized distinction between "assisting suicide and withdrawing life-sustaining treatment," a distinction consistent with the result reached here. *See* 521 U.S. at 800-01. As Chief Justice Rehnquist wrote:

> The distinction [between cessation of life-sustaining treatment and assisted suicide] comports with fundamental principles of causation and intent. First, when a patient refuses life-sustaining medical treatment, he dies from an underlying fatal disease or pathology; but if a patient ingests lethal medication prescribed by a physician, he is killed by that medication.

Id. at 801.

Here, the District Court recognized, based on testimony from Respondents' and Petitioner's experts, that the decedent suffered an irreparable brain injury due to cardiorespiratory arrest, a "terminal condition" that would cause her death notwithstanding the extraordinary life-sustaining measures prescribed by Respondents. *See, e.g., Law*, 116 F. Supp. 2d at 306. The District Court further

concluded from the evidence that all parties were aware that, without brain function, cessation of those life-sustaining measures would undoubtedly result in her death. These facts, and the actions taken by Respondents in response to them, were fully consistent with the principles enunciated in *Vacco* and *Cruzan*. *See Vacco*, 521 U.S. at 807 (*citing Cruzan*, 497 U.S. at 278, for the proposition that "this Court has also recognized . . . the distinction between letting a patient die and making a patient die."). Any assertion from Petitioner that, based on the *Cruzan* and *Vacco* cases, allowing decedent in this case to die was tantamount to "involuntary euthanasia" or "physician-committed homicide" is utterly disingenuous.

IV. Petitioner's Claim that the Second Circuit "Grossly Misinterpreted" Connecticut General Statutes Section 19a-571 Is Incorrect, Irrelevant, And Should Not Be Addressed By This Court.

After considering hundreds of pages of briefs, consulting extensive legislative history, and entertaining lengthy oral argument, the District Court declined Petitioner's invitation to transform Connecticut General Statutes Section 19a-571 into a legislative standard of care capable of supporting a *negligence per se* claim. *Law*, 116 F. Supp. 2d at 303-304. The Second Circuit adopted the District Court's analysis on this issue after similar consideration. Both decisions reached the only conclusion justified by well-settled Connecticut case law and by the clear intent of the legislature. Without referencing any supporting case law or legislative history, Petitioner now asks the Court to grant certiorari to second-guess the Second Circuit's interpretation of state law, a role unsuited for this

Honorable Court. *See Stenberg v. Carhart*, 530 U.S. 914, 940 (2000); *American Booksellers Ass'n, Inc.*, 484 U.S. at 395.

Perhaps more importantly, even if Petitioner prevails on this claim, his victory is Pyrrhic, for he cannot change the outcome given the lack of expert testimony on causation. *Law*, 116 F. Supp. 2d at 305; *Shegog v. Zabrecky*, 36 Conn. App. 737, 745-466, 54 A.2d 771 (1995). As such, any decision by this Court would be merely hypothetical. Further review by this Court is not only unnecessary but inappropriate. *See Steel Company v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998).

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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